Department of Law Monthly Report

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Bruce M. Botelho
Attorney General

Barbara J. Ritchie
Deputy Attorney General – Civil Division

Cynthia M. Cooper
Deputy Attorney General – Criminal Division

In This Issue

Collections & Support

CHILD SUPPORT OBLIGOR RESPONDS TO MOTION TO SEEK WORK

In *Lindbloom*, AAG Connie Carson obtained a favorable resolution of a case in which she had filed a motion for an order requiring a child support obligor to seek work and to submit employment information to the court. In lieu of responding to the motion, the obligor entered into a payment agreement with CSED pursuant to the licensing provisions of AS 25.27.246. Pursuant to the agreement, the obligor will pay a lump sum amount of $3,000 within 30 days and $500 per month payments after that. Ms. Carson withdrew her motion for the seek work order, on condition that the motion may be refiled if appropriate.

COURT DENIES CUSTODIAL PARENT'S REQUEST FOR INVESTIGATION

In *Maxwell*, AAG Connie Carson opposed a custodial parent's motion for an order requiring CSED to investigate the obligor's financial situation in a court proceeding for modification of support. The custodial parent based her request on her belief that the obligor's lifestyle indicated an ability to make child support payments above the current $50 per month (which was set based upon the obligor's health problems). AAG Connie Carson opposed the request for CSED investigation, citing CSED's limited resources and the fact that it would be improper for a court

to order discretionary action outside of CSED's standard procedures. The court denied the custodial parent's request for a CSED investigation, but set a hearing for July to address the child support issues.

ALASKA SUPREME COURT RULES FOR CSED

AAG Mary Gilson received a favorable decision from the Alaska Supreme Court in *Wright v. Wright*. Mark Wright had moved for relief from a child support order in effect from June 1988 through May 1996. The court affirmed the trial court's determination that retroactive modification of the support obligation was prohibited and no grounds existed under Civil Rule 60(b) to set aside the 1988 order. The court found that defective motions filed by Wright in 1988 and 1992 did not serve to establish an earlier effective date for modification because he did not follow directions by the court to correct the deficiencies. The court agreed with our argument that the facts of the case were within the scope of Civil Rule 60(b)(1), and therefore Wright's motion for relief was time barred as it was brought eleven years after the order was issued. The court noted, "Although we have 'allowed pro se litigants certain latitude . . .,' we have never relaxed the substantive requirements of Civil Rule 60(b) because of a litigant's pro se status."

COURT ACCEPTS CSED'S CALCULATIONS IN MODIFICATION CASE

In *Marshall*, an obligor opposed AAG Pamela Hartnell's motion to modify his support obligation. In his opposition, Marshall raised objections to CSED's calculations and complained about how a future child care credit is deducted. At the hearing, his attorney argued that Marshall should be given prospective child care credit even though the child care expenses are speculative. CSED caseworker Carole Swanson-Nord testified telephonically about her calculations. Judge Pengilly complimented Carole for the clear explanations she gave. Judge Pengilly later granted the prospective child care credit but used CSED's calculations for the modification.

COURT RULES IN CSED'S FAVOR ON VOLUNTARY UNEMPLOYMENT ISSUE

In *White v. White*, AAG Richard Sullivan obtained a favorable decision on an issue of voluntary unemployment. Mr. Sullivan had filed a motion on CSED's behalf to increase the support from $222 to $446 per month based on the obligor's income for the year 2000. The obligor opposed the motion and argued that the court should enter a $50 per month order because she was no longer employed, having decided to stay home with her new baby. Ms. White also testified that she had an anxiety disorder which precluded her from working. Because Ms. White failed to show that a reduction in support was necessary to avoid substantial hardship to the subsequent child and failed to prove that her medical condition precluded her from working, the court imputed income to Ms. White based on the amount she earned in 2000. Accordingly, the court entered a child support order in the amount requested by CSED.

Commercial

ALASKA SUPREME COURT REJECTS ATTEMPT TO HAVE ALASKA PERMANENT FUND DIVISION'S ALIEN ELIGIBILITY STATUTE DECLARED UNCONSTITUTIONAL

The Department of Revenue denied applications filed by Martha Andrade, Belly Barahona, and their children for 1996 dividends because they were in an immigration status that prevented them forming the intent to remain in Alaska. Applicants without that ability cannot qualify for a Permanent Fund dividend. In response, the family brought a class action for damages and for an order declaring unconstitutional the statute used to deny their applications. The Alaska Supreme Court found the statute constitutional.

State, Department of Revenue v. Andrade, Supreme Court No. S-9329/9339. The court also affirmed the superior court's decision to certify the case as a class action and the superior court's finding that the class failed to state claim for money damages under the state's civil rights laws. The court did find, however, that the class was the prevailing party in the superior court because by filing the class action, the class brought to the attention of the Department of Revenue the fact that the department's regulation on alien eligibility for a dividend did not comport with federal law. Thus, even though the class did not prevail on any issues of dividend eligibility in the litigation, the class is eligible for a substantial award of attorneys fees. Former AAG Neil Slotnick represented the state in this appeal.

ALASKA SUPREME COURT AFFIRMS DENIAL OF APPLICATIONS FOR THE PERMANENT FUND IN TWO CASES

On May 2nd, the Alaska Supreme Court affirmed the Alaska Permanent Fund Division's denial of the applications that Douglas Anderson and his son filed for the 1997 dividend. *Anderson v. State, Department of Revenue,* Supreme Court No. S-09418. Mr. Anderson is an active-duty Coast Guard officer. He left Alaska in 1991 when a duty assignment took him to Oregon. Alaska residents living outside the state on active military duty may qualify for the Permanent Fund dividend so Mr. Anderson and his son continued to receive the dividend during the absence. If applicants live outside of the state for more than five years, like the Andersons, they must overcome a presumption that they are no longer Alaska residents. The Andersons could not overcome the presumption so the division denied their application for the 1997 dividend. They unsuccessfully appealed the denial first to the superior court and then to the Alaska Supreme Court which affirmed the denial in a memorandum opinion and judgment. AAG Dan Branch represented the state in this appeal.

The Alaska Supreme Court also affirmed the Alaska Permanent Fund Division's denial of the applications that Robert Cousins, his wife, and children filed for the 1997 dividend. *Cousins v. State, Department of Revenue*, Supreme Court No. S-9280. Lengthy absences from Alaska in the prior year made the Cousins family ineligible for the dividend. The Cousins family appealed the denial. They argued that the state's allowable absence rules violated their constitutionally protected rights to equal protection and interstate travel. The court rejected these claims in a memorandum opinion and judgment. AAG Dan Branch represented the state in this case.

Consumer Protection

JOHNSON & JOHNSON CONTACT LENS SETTLEMENT

A U.S. District Court in Florida entered preliminary approval of a proposed multistate settlement between Alaska, 31 other states, a private consumer class, and contact lens manufacturer Johnson & Johnson Vision Products. The settled lawsuits resolve antitrust charges that were filed in December 1996 against Johnson & Johnson, Bausch & Lomb, CIBA Vision, and the American Optometric Association. Under the proposed settlement, Johnson & Johnson guaranteed to distribute $30 million in rebates to consumers, pay $25 million in cash into a settlement fund, and distribute up to $5 million in cash or coupons to consumers who had worn Johnson & Johnson contact lenses but no longer do so. Bausch & Lomb reached a similar settlement in January. CIBA Vision reached a settlement with the states in November 2000. Alaskans who have bought replacement lenses from Johnson & Johnson, Bausch & Lomb, or CIBA Vision at any time since January 1988 will be eligible to receive the settlement benefit packages.

Fair Business Practices

OCCUPATIONAL LICENSING

AAG Robert Auth, on behalf of the Division of Occupational Licensing, was successful in negotiating a settlement of a disciplinary matter involving an Anchorage veterinarian. The disciplinary action was based on the veterinarian's breach of a prior agreement not to consume alcohol. On May 17, 2001, the Board of Veterinary Examiners adopted the agreement between the division and the veterinarian. Under the terms of the new agreement, the veterinarian paid a civil fine of $5,000 (the maximum allowed under AS 08.01.075(a)(8)) and agreed not to practice veterinary medicine in Alaska. She may be allowed to practice in the future if she undergoes, at her own expense, extensive testing and treatment and establishes, to the Board's satisfaction, that she is competent to practice.

AAG Roger Rom, on behalf of the division, helped prepare and file an accusation against a marital & family therapist for starting a relationship with a former client's husband resulting in the breakup of the marriage and trauma to their children, who were also former clients of the therapist. In another case, AAG Rom also helped prepare and file an accusation in a discipline case involving a local psychologist, who is accused of testifying outside of her expertise as an expert on fetal alcohol syndrome at a SSI disability hearing that resulted in a denial of benefits. The denial of benefits was ultimately reversed, but only after considerable litigation.

INSURANCE CODE REVISED

AAG Signe Andersen completed the legal review of HB 184, which was a governor's bill passed by the legislature containing extensive revisions to the insurance code (AS 21). The primary purpose of the bill is to implement financial services reforms affecting the business of insurance that are necessitated by the federal Gramm Leach Bliley Act (GLBA). These reforms provide for reciprocity in the licensing of insurance producers, consumer protections in the sale of insurance by financial institutions, and privacy protections relating to the disclosure or use of personal financial or health information by insurance companies. This bill also contains substantial revisions to the insurance code provisions regulating insurance company investments. These revisions update the code to reflect changes in investment types and to establish a framework for new investment limitations that are consistent with limitations in other states. And, lastly, the bill adds a couple of new provisions that are aimed at protecting consumers from persons who have criminal convictions. One provision gives the division of insurance authority to obtain national criminal background checks on persons applying for an insurance license. The other provision confirms a requirement under federal law for obtaining consent from Alaska's director for the division to engage in the business of insurance with respect to persons convicted of a felony involving dishonesty or breach of trust.

REGULATORY COMMISSION OF ALASKA

AAG Steve DeVries represented the Public Advocacy Section (PAS) of the Regulatory Commission of Alaska in phase II of a Matanuska Telephone Association (MTA) rate case that went to hearing. This phase dealt with how MTA's revenue requirement was to be allocated among its customer classes. MTA wanted to use federal universal service funds to subsidize various business classes. The PAS said that under FCC directives, the intent is for USF to be used to principally benefit residential service. The effect of a PAS victory in interpreting the USF issue will mean lower rates for residential consumers in MTA's service territory, but at the expense of higher business rates. A decision is pending.

Governmental Affairs

NEW EMPLOYMENT LAWSUITS

The month of May brought us several new lawsuits involving employment disputes. A union representing a group of state employees claims that the Department of Natural Resources has used emergency firefighters inappropriately. An employee of the Department of Health and Social Services alleges that she has suffered discrimination and retaliation because of her sex and union activities. An employee of the Department of Natural Resources asserts that she has suffered discrimination because of her national origin. A former employee of the Department of Transportation and Public Facilities claims that he was discharged because of whistleblowing. We have answered—or are in the process of answering—each of the complaints. Next, we will conduct discovery to learn whether there is evidence to support their claims.

MEDICAID RATE APPEALS SETTLED

Based on a negotiated settlement, we filed a stipulation to dismiss an administrative appeal involving Valley Hospital Association's FY 1999 Medicaid rate. We have negotiated similar agreements with Valley Hospital on the Medicaid rates for fiscal years 1997 and 1998, and anticipate filing stipulations for dismissal by mid-June. Also during May, Charter North Hospital and the Medicaid Rate Advisory Commission staff agreed to settle rate appeals for fiscal years 1996-2000. We expect to file stipulations for dismissal of those appeals soon.

AGO CO-HOSTS EMPLOYMENT LAW UPDATE

Staff of the Governmental Affairs Section in Anchorage and Juneau who have expertise in employment law helped present an update on personnel law for state human resource managers and other staff who work on personnel matters. Approximately 90 state employees attended the training. We worked with the Department of Administration, Division of Personnel, to help plan and present a one-and-a-half-day program at Centennial Hall in Juneau, May 30 - 31. AAGs Dave Jones and Jan DeYoung from Anchorage, and Sarah Felix and Kathleen Strasbaugh from our Juneau office, were all presenters at the training. AAG Jan Levy of the Juneau Oil and Gas Section, the Ethics Attorney, joined us on May 30, with a presentation on the Executive Branch Ethics Act. We received very positive feedback from the participants on the training and are pleased to report that it was a resounding success.

STATE OVERTURNS ARBITRATOR'S DECISION IN SUPERIOR COURT

We successfully challenged a labor arbitrator's decision in state superior court where the arbitrator refused to apply the proper standard for "just cause" for discharge of a state employee. The arbitrator had refused to apply the standard for just cause that had been adopted by the Alaska Supreme Court in *Braun v. Alaska Comm. Fishing & Agric. Bank,* 816 P.2d 140, 142 (Alaska 1991). We challenged the arbitrator's decision, and Juneau Superior Court Judge Larry Weeks agreed with our position. Judge Weeks held that the arbitrator committed gross error in failing to apply the *Braun* just cause standard to public employee discharge, and vacated the arbitrator's decision. However, Judge Weeks did not rule in our favor on another issue in this case. We had argued that it was a violation of public policy for the arbitrator to reinstate an employee to a position at the Child Support Enforcement Agency if that employee had been convicted of a theft crime. Judge Weeks did not find that reinstatement violated public policy. The union has filed a motion for reconsideration of that part of Judge Weeks' decision concerning the *Braun* case. The motion has been pending for three weeks, and we should know by mid-June if Judge Weeks will reconsider his decision. This case was handled by AAG Pat Gullufsen.

Legislation/Regulations

REGULAR LEGISLATIVE SESSION ADJOURNS MAY 8 SPECIAL SESSION CALLED FOR JUNE 7

During the month of May 2001, the Legislation and Regulation Section completed work related to the adjournment of the regular legislative session and prepared for the first special session called for June 7 on marine passenger vessels. The section assigned and edited over 100 reviews of pending legislation.

The section also completed legal reviews on several important regulations projects, including aquatic farming, child support enforcement practices and procedures, fisheries regulations, emergency medical services personnel, and occupational licensing fees. The section also advised the Board of Agriculture and Conservation and the Department of Natural Resources on regulation adoption and approval matters.

Natural Resources

NEPA TRAINING

Laura Bottger and Lance Nelson attended a week-long training class in Anchorage presented by the National Marine Fisheries Service on the National Environmental Protection Act. Recent litigation involving fishery management decisions has highlighted the importance of NEPA compliance.

NORTHERN INTERTIE LITIGATION SETTLED

The Northern Intertie case (dealing with an electric transmission line from Healy to Fairbanks) has been settled. The impetus for the settlement was a combination of Golden Valley Electric Association's threats of pursuing damages against the appellants, the state's pending motion to dismiss, and the appellants' attorney simply feeling the pressure of multiple motions and not enough time to deal with them between his trips into the field as a UAF professor to study forests and to Bosnia to deal with war crimes. The state had moved to dismiss for lack of standing based on AS 38.05.035(l), which requires that the appellants participated in a request for reconsideration before the commissioner on the issues raised in the court. None of the appellants met these requirements. This may be the first briefing on this issue.

Under the stipulation, DNR, as a matter of administrative policy, agrees to give full consideration to state fen wetlands in the Tanana Flats in future land use planning documents and best interest findings. GVEA provided a one-time $10,000 grant for studying fen vegetation. All parties pay their own attorneys' fees and costs. GVEA and the state waive any right they may have to collect damages from the appellants. The order of dismissal has been signed. This case was handled by AAG Mary Lundquist.

Oil, Gas, and Mining

AAG BONNIE ROBSON ACCEPTS POSITION WITH DEPARTMENT OF NATURAL RESOURCES

In May, AAG Bonnie Robson accepted the position of Deputy Director with DNR Division of Oil and Gas. Bonnie has extensive experience in both the state and private sector regarding oil and gas issues and we wish her well. Bonnie's departure to DNR is not really a farewell because fortunately the OGM section represents DNR, so our working friendship continues from a different side of the desk.

STATE ASSESSMENT REVIEW BOARD UPHOLDS THE DEPARTMENT OF REVENUE'S METHODOLOGY FOR VALUING TAPS FOR PROPERTY TAXES

The State Assessment Review Board ("SARB") held a three-day property tax hearing in May to review the Department of Revenue's ("DOR") 2001 assessed value for the Trans-Alaska Pipeline System ("TAPS"), which carries oil for 800 miles from the North Slope to Valdez. The SARB issued its decision, which upheld DOR's methodology for valuing TAPS, one week later.

DOR originally established a value of $3.017 billion for TAPS using its so-called TSM methodology, which determines a value by discounting future pipeline income, less expenses, to the present. The three municipalities that receive substantial property tax income relating to TAPS (the North Slope Borough, Fairbanks North Star Borough, and Valdez) submitted an appraisal that indicated the value should have been $2.9 billion. The TAPS owner companies' expert valued TAPS at $2.1 billion. Reconciling these values, DOR issued an assessed value for TAPS at $2.75 billion. Both the municipalities and the owners appealed DOR's assessed value to SARB.

SARB decided that DOR should not have lowered its TAPS value from $3.017 billion to $2.75 billion, and that DOR's TSM methodology provided the best value indicator. The positive tax impact of raising the assessed value from $2.75 billion to $3.017 billion is approximately $5 million in taxes per year. AAGs Bonnie Harris and Martin Schultz represented DOR in the hearing.

ALASKA SUPREME COURT AFFIRMS DEPARTMENT OF NATURAL RESOURCES MINING DECISION

In *Newmont and DNR v. McDowell*, the Alaska Supreme Court reversed the superior court and affirmed a DNR mining decision holding that a miner's improper payment of annual rent should be treated under AS 38.05.265, the governing statute, as a timely but curable deficient rent payment rather than a failure to pay annual rent triggering automatic abandonment or forfeiture of the claims.

A miner had paid the equivalent of one year's rent on a principal block of newly staked mining claims when, under an anomaly in the rental scheme, both first and second years' rents were simultaneously then due. The miner also included payment of a small additional amount equivalent to first-year rent on a handful of other newly staked claims for which only a first-year rental payment was due. DNR ignored the payment for the additional claims and, based on examination of statutory intent and policy considerations, directly decided that a single payment against simultaneously due rental obligations was properly deemed a deficient payment as to both years' obligations rather than the non-payment of one year's rental obligation. However, the Alaska Supreme Court premised affirmance on the basis that the extra amount paid beyond the first-year rental on the principal block constituted a small but nonetheless deficient payment as a matter of law against both the second-year rental on the principal block and the first-year rental on the additional handful of claims.

In resolving the case on the foregoing secondary premise, the court noted it avoided decision on whether DNR required a regulation to treat inadequate payment of simultaneously due obligations as a deficiency situation, thus reaffirming the continued vitality of the *Jerrel v. State* pitfall (with DNR here having in fact very nicely noticed and otherwise handled the adjudication, the court itself seemingly satisfied with DNR's substantive reasoning, and the parties arguing the case primarily with respect to DNR's decisional premise). The court also, and somewhat gratuitously, observed that the case probably contained an administrative estoppel situation. A petition for reconsideration has been filed by the losing parties (miners who staked the disputed claims on the theory they were abandoned). AAG Lou Agi represented DNR.

Transportation

CARGO PORT TRANSACTION COMPLETED

AAG John Steiner assisted with closing a financing and lease arrangement for the Williams Lynxs CargoPort facility at the Ted Stevens Anchorage International Airport. AIDEA provided approximately $15 million to finance the cargo transfer facility. The airport assumed title to the improvements, which were leased to Williams Lynxs for a nominal sum for forty-eight years. Upon expiration of the lease, the airport will take possession. Northwest Airlines subleased the bulk of the facility from Williams Lynxs. This arrangement will allow increased cargo traffic through Anchorage and increased cargo sorting in Anchorage. To put perspective on the benefits to the local economy from this activity, the University of Alaska Anchorage, Institute for Social and Economic Research ("ISER") has estimated that one in every ten jobs in the Anchorage economy is related to aviation operations at the Ted Stevens Anchorage International Airport. ISER also estimated that a weekly international cargo flight stopping to refuel in Anchorage generates an average of 8 jobs in the local economy, and that a flight that transfers cargo in Anchorage doubles that figure by generating 17 local jobs. Fees from cargo flights also help pay for airport passenger facilities. It is hoped and expected that the investments by AIDEA, the airport, and the Williams Petroleum Company will prove the accuracy of ISER's estimates through the creation of local jobs.

TRANSIT WITHOUT VISA RULE ALTERED

The United States Department of State and the Immigration and Naturalization Service instituted a new rule prohibiting airplanes from refueling in the United States while en route from a foreign country to a foreign country if they are carrying travelers without visas who are citizens of certain countries. The rule was designed to keep travelers from disembarking who might seek to smuggle drugs into the United States or who might seek to illegally immigrate into the country. The rule was unnecessary in Anchorage because passengers on flights that merely refuel in Anchorage are held in a secure area and because the problems the rule sought to correct have not occurred in Anchorage. The rule threatened to seriously impact passenger airlines carrying Russian and Chinese travelers from Asia through Anchorage to Canada or Europe. Russian and Chinese travelers without visas would have to fly a different route that avoided Anchorage. Airlines carrying significant numbers of Russian and Chinese passengers without visas through Anchorage believed that to stay competitive they would have to relocate their entire refueling operations to another city, such as Vancouver, British Columbia. The reduction in personnel in Anchorage would probably dictate also moving the cargo facilities of those airlines to another city. The resulting loss to Anchorage would total in the many millions of dollars. With assistance from AAG John Steiner, the Governor's Office obtained a temporary moratorium of enforcement of this rule in Anchorage, and, with President Bush's recent meeting with Prime Minister Putin as a catalyst, a lifting of this rule as applied to Russian travelers. The State Department is still studying whether the rule should be applied to Chinese travelers.

SEWARD HIGHWAY CONSTRUCTION CLAIM SETTLED

AAG's Tom Dillon and Jim Cantor helped negotiate a settlement of a multimillion dollar construction claim by Herndon & Thompson, Inc., a DOT&PF contractor for the reconstruction of a portion of the Seward Highway. The contractor claimed entitlement to additional compensation on account of differing site conditions. The final negotiation, which lasted about 16 hours, included representatives of DOT&PF and its claims consultants, Herndon & Thompson, Inc., and its attorneys and consultants, and Herdon & Thompson's surety, along with its attorney and consultant.

FAIRBANKS COURTHOUSE LAND TRANSACTIONS COMPLETED

AAG Tom Dillon consummated the sale of Alaska Court System land along the Chena River in Fairbanks to the Fairbanks North Star Borough. This sale was complicated by title questions related to accreted riparian land and the need to amend the trust agreements under which the new Fairbanks courthouse was financed. As a result of this sale and the conveyance of an adjacent parcel to the City of Fairbanks, the local government entities now have title to all of the downtown waterfront land on the south side of the Chena River for park and recreation purposes, and the Court System is relieved of responsibility for maintenance of the properties.

ALASKA SUPREME COURT ORAL ARGUMENTS HELD IN TWO TRANSPORTATION CASES

In May, the Fairbanks Transportation Section argued two cases before the Alaska Supreme Court. On May 16, the court heard oral argument in Anchorage in the case of *Foster v. State Department of Transportation*. The case arose out of a direct conflict between the Native allotment claim of the appellant, Mrs. Foster, and the state's ownership of the right of way for the Parks Highway. The primary question on appeal was whether a state court has jurisdiction to hear claims related to ownership or possession of land claimed as an Alaskan Native allotment. The state's position under these circumstances, with which the superior court agreed, is that state courts have no jurisdiction, and that federal jurisdiction is exclusive. The case was argued by AAG John Athens.

On May 23, the court heard oral argument in Fairbanks in the case of *Jackovich et al. v. State Department of Transportation*. This is an inverse condemnation case in which the landowners claimed that their property values had decreased solely as a result of the state's planning activities associated with the longstanding proposal to build the Illinois Street project in downtown Fairbanks. The superior court granted summary judgment, finding that the state had never publicly announced its intent to condemn any of the landowners' parcels of property, nor was there any evidence that the State had in any way acted unreasonably. AAG Mason Damrau argued for the state.

CRIMINAL DIVISION

ANCHORAGE

Mark Strumsky was found guilty by a jury of three counts of sexual abuse of a minor in the second degree. Strumsky is a former Anchorage School District teacher who sexually abused a 10-year-old girl in the summer of 2000. The girl would come over to his house to play with his son. The abuse was reported later when the girl saw a safety video and spoke to the school nurse about the incidents. Strumsky is scheduled to be sentenced in August 2001.

Jason Pritchard was indicted by a grand jury on five counts of attempted murder and three counts of assault in the third degree for an attack on children lined up for early morning breakfast at the Mountain View Elementary School. Pritchard approached the children and started slashing their throats with a fillet knife. Police response was quick and they cornered Pritchard in a classroom. A teacher was holding Pritchard at bay and away from a boy who had already been slashed. The police were able to use less than deadly force to place Pritchard in custody, approximately 15 minutes after the incident began. At superior court arraignment, Pritchard tried to dispose of his court-ordered public defender. However, the judge ruled that Pritchard should have at least 15 days to reconsider his decision. Bail was set at $2 million and trial is scheduled for August 2001.

Michael Jeffries was convicted by jury trial of murder in the second degree, manslaughter, criminally negligent homicide, and felony DWI. This was Jeffries' seventh DWI conviction.

Jeffries pulled in front of an on-coming vehicle as he was turning into a side street; his passenger was killed. Jeffries' BAC was measured at .27. Sentencing is scheduled for October 2001.

Three people were charged with kidnapping, assault in the first and third degree, robbery in the first degree, and vehicle theft for a car jacking. The vehicle owner was abducted from a local mall parking garage and escaped by jumping out of the vehicle a while later. One of the three was a juvenile who was waived into adult court. Bail was set at $250,000 for each defendant.

BARROW

A defendant pled out on a bootlegging charge and will be sentenced next month. The grand jury returned indictments against two defendants for assault and against another defendant for felony DWI. Plans went ahead for the relocation of the Barrow DAO to the new court building (in the remodeled Stuaqpak) by the end of June. The superior court rejected motions for new trials by an assault defendant, based upon a *Batson* jury selection issue, and by a sexual assault defendant who claimed his plea was not knowing and intelligent because of language difficulties and the absence of an interpreter.

BETHEL

Ros Lockwood transferred to the Kotzebue Office for the summer. She will be missed here!

Olivia Mackin transferred here from Anchorage. She started her second day here with a trial.

Howard Wassilie, Jr., was found guilty of vehicle theft in the first degree and DWI after a jury trial.

CORRECTIONS

On May 4, 2001, Judge Andrews discontinued all court oversight of Department of Corrections operations and released class counsel for all issues except pending appellate matters. This action was in response to DOC's record of compliance with the Cleary settlement agreement and the state's motion to dismiss the Cleary settlement agreement filed last August under the Alaska Prison Litigation Reform Act. Judge Andrews found the act to be constitutional and we expected her to issue a full opinion very soon. The practical effect is that the Cleary settlement agreement can no longer be enforced unless the prisoners demonstrate a system-wide violation of state or federal law under the terms of the state PLRA.

FAIRBANKS

Homicides dominated the crime news in Fairbanks for the month of May. William Carroll pled guilty to second-degree murder and assault in the first degree for shooting at a snow machine carrying four passengers departing from a party at his house in Fort Yukon. Norman Lolinitz pled guilty to murder in the first degree and second-degree murder for shooting a friend in Koyukuk while he was intoxicated. A child also died because of pass-through bullet. Oliver Lemon was charged with second-degree murder for a domestic violence assault which led to the death of his live-in girl friend.

Congratulations to ADA Devinder Brar for passing the Alaska Bar exam.

JUNEAU

Although this month saw no trials, the beginning of summer brought out the drunk drivers. Craig Klawitter, Donald Martin, Tina Peters, Charley Larson, and Martin Fall were all charged with felony DWI.

John Logan was able to parlay his misdemeanor theft of a stereo from K-Mart to a felony by, after getting the stolen goods out of the store, coercing three 12-year-olds to carry the stolen property to Logan's home under threats of assault. The children told their parents, despite the defendant's threat to "kick your ass if you tell."

It took the police a few days to investigate. The delay in the investigation did not stop the police from immediately seizing the stereo, because when Logan's wife returned home, she called the police to report someone had left a stereo in her house. After the coercion was reported, the stereo was found in the evidence locker.

KETCHIKAN

After an 11-day trial, a jury was hung on charges of murder in the first degree and tampering with physical evidence against Jose Mateu, who is accused of killing his father. Re-trial is set for September.

One hour after closing arguments ended in the Mateu case, the Ketchikan police received a call about a new murder. Steve Bowen was found dead in his home with his head bashed in. Carl Abuhl has been indicted for murder in the first degree, cruelty to animals, and misconduct involving weapons in the third degree. Abuhl told the police that he had killed Bowen by hitting him numerous times in the head with a baseball bat and then trying to kill Bowen's favorite cat by microwaving the cat. The cat survived, although with injuries that are being treated by a local veterinarian. Abuhl also admitted to giving a handgun to a friend.

Brandon Baker was convicted by a jury of robbery in the second degree, but found not guilty of theft and assault in the third degree. Baker threatened a 17-year-old boy in an attempt to collect $500 that the boy's brother owed to Baker. The victim testified that Baker took $7 from him.

A Ketchikan man was convicted of arson in the first degree. He was leaving a party when a stolen cell phone was found on him. A scuffle ensued. He then got a can of gasoline which he poured on a car outside the house and on the garage which is below the residence, and set it on fire. The fire department was called and quickly put out the fire.

A Craig jury convicted the Thorne Bay VPSO of assault in the fourth degree. When he was talking with a teenager, he asked him if he had been drinking alcohol and, after the teenager said no, the VPSO asked him to take a portable breath test. When the teenager refused, the VPSO grabbed him by his arm, which had been previously broken, threw him onto the ground, and put his leg on the broken arm.

A Ketchikan man was convicted of assault in the fourth degree for threatening a woman's life; he has assaulted her in the past.

A Ketchikan man was indicted for robbery in the first degree for threatening another person with a stun gun and demanding money. Metlakatla police went to a house where they had reports that drugs were being sold and found cocaine on several people. One of the individuals said he had gotten the cocaine from the owner of the house. Two of the people were charged with misconduct involving a controlled substance in the fourth degree and the owner was charged with misconduct involving a controlled substance in the third degree. Another Metlakatla resident was indicted for vehicle theft and DWI for stealing a car (the keys were left in the car) and crashing it into a ditch. A Ketchikan man was indicted for failure to render assistance, reckless driving, and two charges of assault in the third degree when he crashed a vehicle, injuring his two juvenile passengers, and then fleeing. Three Ketchikan residents were indicted for burglary in the second degree and theft in the second degree when they were caught leaving a business late at night with a safe on a handcart. Three different men were charged with felony DWIs; two were also charged with felony refusal to submit to chemical test. A Klawock resident was indicted for burglary in the first degree, assault in the fourth degree, and violating a DV order.

KODIAK

A 53-year-old woman from Old Harbor had a conviction of record imposed and was sentenced to 12 additional months to serve after rejecting

probation in her felony drug case upon her third petition to revoke. The woman had originally been given a suspended imposition of sentence upon her conviction for possession of ½ gram of cocaine.

A judge found that a 22-year-old Kodiak man violated his felony probation after an adjudication hearing that spanned four days. The adjudication was on the fourth petition to revoke probation filed since his release from incarceration last November.

A 39-year-old Kodiak man was indicted for vehicle theft in the first degree and felony DWI. A warrant check revealed a felony bench warrant arising out of a felony DWI and vehicle theft in Palmer.

A 30-year-old Anchorage man was arrested and indicted for two counts of misconduct involving a controlled substance in the fourth degree after taking possession of a FEDEX package containing two pounds of marijuana. The marijuana, which had been intercepted and opened pursuant to a search warrant, was delivered to this defendant at his room at a local motel. The police arrested him when he left the room 20 minutes later, having already opened and subdivided the contents of the package.

A 27-year-old Kodiak man was arrested and indicted for one count of misconduct of a controlled substance in the second degree and a second count of attempted misconduct involving a controlled substance in the second degree after forging two prescriptions for hydrocordone, a schedule 1A controlled substance. The man, who had gotten two legitimate prescriptions for 10 tablets, had altered the prescription from 10 tables to 70 tablets in each case. When the man came in twice in less than a week with a prescription for 70 tablets each time, the pharmacist became suspicious and called the police, who interdicted before the man was able to actually receive the second prescription.

KOTZEBUE

Assistant district attorney Andy Josephson left the office in mid-May after about a year and a half in Kotzebue. Andy is joining his father's law practice in Anchorage. Ros Lockwood is filling in for several months in Kotzebue until Windy East arrives as the resident ADA in late August. Ros got an unpleasant greeting to Kotzebue in the form of an acquittal in a DWI case, but has settled in and is trying to figure out the unique Kotzebue legal system. She has been screening a substantial case backlog, has taken half a dozen cases to grand jury, and is preparing for a major sexual assault trial in June. None of this was made any easier by the office flooding during the first major thaw of the year.

NOME

Shishmaref resident Kim Ningealook was convicted by a Nome jury on a charge of sexual assault in the second degree. It was a completely circumstantial case, as the victim had no recollection whatsoever of the incident and there were no witnesses to the assault. The DA was less successful in the trial of Clarence Katchatag on a charge of physically assaulting his daughter. The jury apparently accepted the parental discipline defense. Ben Noyakuk was indicted for the murder of his girlfriend the facts of that case were reported last month. New cases include a felony domestic assault and a sexual assault, also from Gambell. In the domestic assault case, the recanting victim is now claiming that the defendant had actually been shooting at some geese that had been flying overhead. Jimmy Fred Tocktoo was arrested on a burglary charge in Brevig Mission after breaking into a former girlfriend's house and assaulting her. Nome resident Donna Ellanna was charged with a series of forgeries, totalling about $10,000, that she admitted were done to finance a cocaine habit.

Two unrelated felony assaults from the village of Koyuk, by Arno Nassuk and Charles Charles, were resolved with changes of plea. Also

pleading out was Dennis Towarak on a sexual assault charge from Unalakleet.

PALMER

Jesse Lanman, a member of the Chickaloon tribe, was convicted of driving with no valid driver's license, after a bench trial.

Perry Beecher was indicted on vehicle theft, eluding, and criminal mischief. Beecher had been a contract employee with Browning Timber Inc, but had recently been terminated. Beecher, believing he was entitled to additional funds from Browning, stole a log boom vessel and log boom sticks with the intention of stopping Browning from loading the raft of logs on a ship headed to Seattle. FWP Troopers responded to Icy Bay, where Beecher was holding the vessel and logs hostage. He refused to cooperate with Troopers, telling them that he would stop anyone who tried to board the vessel or take the logs. Rather than stop and comply with the Troopers' orders, he began a slow chase through Icy Bay. Troopers eventually found a skiff and began to close in on Beecher. The skiff almost tipped over in the wake from Beecher's stern. Troopers stopped the pursuit because it was dangerous, and Beecher was apprehended the next day. A trial date will be set in Cordova.

Mark St. Jeor is pending trial on four counts of sexual abuse of a minor in the first degree. The victim moved to Oregon and her whereabouts were unknown. A material witness warrant was issued and she was eventually found in Bend. The victim now claims the defendant did not engage in intercourse with her. However, the defendant's actions resulted in the victim's becoming pregnant with his child, and the defendant signed the birth certificate. DNA tests are being conducted.

After three hours of deliberation, a Palmer jury convicted John Nichols, age 22, of second-degree murder for the killing of his seven-month-old daughter. The baby died from injuries to her brain and blunt force trauma consistent with "shaken baby syndrome." Nichols was on felony probation at the time and faces a minimum of twenty years in prison.

SITKA

In Kake, a city mechanic stole the village's tools, as well as other items (including an outboard motor) from several people around town. He also defrauded residents of thousands of dollars for auto repairs not performed and parts received. He was headed to the ferry when the Petersberg police apprehended him. They recovered most of the stolen property with a search warrant. The defendant waived indictment and pled guilty to felony theft charges under an agreement conditioned on payment of the restitution up front.

Eric Morrow pled guilty to assault in the third degree (domestic violence) for holding a knife to the victim's throat after he attempted to strangle her. He will serve a two-year sentence. Peter Tardy pled guilty to assault in the third degree after threatening at gunpoint a man who was dating a woman he liked. He will serve four years.

Jonathan McGraw, Jr., pled guilty to assault in fourth degree and was sentenced to one year in jail with six months suspended. His cousin, Dormand C. McGraw, III, was sentenced to a year to serve on misdemeanor probation revocations for driving with a suspended operator's license, drinking, and entering a bar.

Clifford Adams, of Kake, was sentenced to eight years with three suspended on one consolidated count of attempted sexual abuse of a minor in the first degree. He was placed on probation for a period of ten years and ordered to participate in and complete an approved sex offender treatment program.

Aaron Rose of Petersburg was sentenced to 24 months with 18 months suspended and three years of probation for vehicle theft in the first degree for stealing a vehicle while he was

intoxicated and crashing it. He was also convicted of DWI. In a separate case he admitted to two probation violations for making sexually harassing phone calls to juvenile females while on probation for harassment stemming from other sexually harassing calls.

Gregory Musewski of Sitka, a third felony offender, received a sentence of five years with one suspended, and placed in probation for seven years, for attempted assault in the second degree. The court found five aggravating factors applied, including that the conduct was the most serious within its class, that the conduct manifested deliberate cruelty, and that the defendant's history included an adjudication as a delinquent for conduct that would have been a felony if committed by an adult. The state had argued for the maximum sentence of five years to serve with none suspended based on these factors and the defendant's more than twenty-year criminal history that included repeated failed probationary periods.

The grand jury and returned an indictment on several counts of assault in the third degree for a man who swung an axe at several strangers in downtown Sitka on a Friday evening.

OSPA
(Office of Special Prosecutions & Appeals

Prosecution News

Hearing-aid dispenser indicted on federal charges. Juneau hearing-aid dispenser Kenneth Klepinger was indicted this month by a federal grand jury on 41 counts of health care fraud, one count of mail fraud, and 14 counts of money laundering. The charges arose from a joint investigation that was initiated by the Alaska Medicaid Fraud Control Unit and later was joined by the Federal Health Care Task Force. As reported in March 2000, Klepinger originally was charged in state court with one count of scheme to defraud, a class B felony. Klepinger's subsequent motion to withdraw his plea was non-opposed by the state.

Grandstaff convicted of 73 felony counts. Following a month-long jury trial in Fairbanks, former medical doctor Stephen Grandstaff was convicted of 73 felony counts. The counts include one unclassified felony, 32 A felonies, one B felony, and 39 class C felonies. The conduct underlying the charges involved sexual assault and abuse of female patients, stealing money from the Alaska Medicaid Fund by submitting false billings for patient services, and issuing dozens of prescriptions without a legitimate medical necessity. Grandstaff, who was remanded to custody when the verdict was read, will face sentencing in August. The case was investigated and prosecuted by the Alaska Medicaid Fraud Control Unit in cooperation with the Fairbanks Police Department, the FBI, and the Fairbanks District Attorney's office.

Johnson convicted of illegal dumping. Donald Johnson of Nome pled no contest to one count of disposal of waste without a permit. The charge arose from a July 2000 incident in which Johnson, an employee of the Alaska Department of Transportation, drove a DOT asphalt truck onto a remote parcel of private property on the outskirts of Nome and dumped approximately 20 gallons of asphalt. For this offense, Johnson will be required to pay $1,500 in restitution to the property owner and to apply in writing to his DOT superiors for hazardous materials transportation training. A fine of $3,000 was suspended. Johnson will spend two years on probation.

Petitions & Briefs of Interest

Petitions of Interest

Loran readings – preservation of evidence. In an interlocutory petition for review, the state challenges a decision by Naknek Magistrate Deborah Burlinski suppressing "Loran" readings in ten commercial fishing cases. The defendants

are Bristol Bay fishermen who are being prosecuted for fishing in closed waters. Magistrate Burlinski found that the state had violated its duty to preserve evidence by failing to make printouts of the Loran readings. Magistrate Burlinski said the state is required to attach printers to all Loran devices and to use only those Loran devices that are capable of accommodating a printer. *State v. Andrews et al.*, No. A-____.

Batson challenges – review of race-neutral reason for strike. In an emergency petition for review, the state argued that Judge Wolverton had misapplied *Batson* by balancing the prosecutor's reasons for pre-empting the prospective juror against the defendant's interest in having a member of his own race in the jury. The state argued that, once the judge found that the defendant had made a *prima facie* showing of racial discrimination, and once the prosecutor articulated race-neutral reasons for pre-empting the juror, the judge's role was limited to determining whether the prosecutor's reasons were genuine or were instead a pretext for discrimination. (The court of appeals agreed. The court granted the state's petition and, in an unpublished order, ordered Judge Wolverton to decide "whether the prosecutor's reasons were genuine – whether the prosecutor was acting in good faith for race-neutral reasons, or was offering ostensible reasons for the challenge that were, in fact, only a pretext for racial discrimination.") *State v. Cloyd*, No. A-8016.

Briefs of Interest

Due process – possession of trace amounts of cocaine. The state argues that the statute prohibiting knowing possession of even trace amounts of cocaine is not unconstitutionally vague as applied to cocaine users who possess cocaine paraphernalia bearing cocaine residue. In this case, the defendant argued that, for purposes of AS 11.71.040, such persons are indistinguishable from persons who possess twenty-dollar bills, since it is common knowledge that most twenty-dollar bills bear trace amounts of cocaine. *Johnson v. State*, No. A-7651.

Parole searches – parole officer as "stalking horse." The state argues that a parole search is not rendered invalid by the fact that police officers brought a possible parole violation to the attention of the defendant's parole officer or by the fact that the police officers subsequently assisted the parole officer in conducting the parole search. In such circumstances, the parole officer is not a "stalking horse" for the police. *Johnson v. State*, No. A-7651.

Probable cause – odor of marijuana. The state argues that probable cause to search a residence for marijuana is present where an officer identifies the residence as the source of an odor that he recognizes as the odor of growing marijuana. *Lustig v. State*, No. A-7756.

Court Decisions of Note - Alaska

Sentencing – class B felonies. A probationary sentence, *i.e.*, a sentence of less than 90 days of jail time, is not appropriate for a first-felony offender convicted of a class B felony unless both the offender *and* the offense are significantly mitigated. In this case, the offense – perjury – was not significantly mitigated: over the course of a year, the defendant had twice sent a mentally impaired friend to take a paternity test for him, had repeatedly perjured himself, and had repeatedly persuaded his friend to perjure himself, all in an effort to avoid paying child support. The defendant also had participated in a letter-writing campaign designed to bring political pressure to bear on those who were investigating his offenses. Because the defendant's offense was not significantly mitigated, the sentencing judge erred by imposing a probationary sentence. (In this case, Judge Card had suspended imposition of sentence and had not required the defendant to serve any jail time.)

Brueggeman v. State, Op. No. 1737 (Alaska Court of Appeals, 5/4/01).

Sentencing – class B felonies. In the course of disapproving a probationary sentence for a class B felony offender, the court of appeals explored the interplay of recent Alaska Supreme Court decisions, particularly *State v. Wentz*, 805 P.2d 962 (Alaska 1991), with the sentencing guidelines established in *Jackson v. State*, 776 P.2d 320, 326-27 (Alaska App. 1989), for class B felony offenders. The court acknowledged that "the top range of the *Jackson* guidelines might be attacked as being inconsistent with *Wentz.*" But the majority ultimately concluded, albeit in *dicta*, that "the *Jackson* benchmark ranges are consonant with the supreme court's decision in *Wentz*." Judge Coats, who concurred in the decision, expressed greater doubt about the validity of *Jackson*. *Brueggeman v. State*, Op. No. 1737 (Alaska Court of Appeals, 5/4/01).

Consent searches – limited consent to enter. Police officers who obtained a property owner's limited consent to enter her residence were not justified thereafter in following the owner into the downstairs portion of the house. The property owner had invited the police into her house, then had asked them to wait upstairs while she went downstairs to fetch her husband. Instead of going upstairs, the police officers followed the owner to the downstairs portion of the house, where they found and eventually arrested her husband. The court of appeals said the owner's failure to object as the officers followed her did not "constitute the affirmative act of consent the fourth amendment requires." The court also said a search of the downstairs wasn't justified as a "protective search." *Haskins v. Municipality of Anchorage*, Op. No. 1738 (Alaska Court of Appeals, 5/4/01).

Right to testify – LaVigne claims. A defendant who acknowledges that he received an adequate *LaVigne* warning at trial, and who does not establish that his decision not to testify was involuntary, is not entitled to post-conviction relief under *LaVigne*. In such a case, it is appropriate to dismiss the application for post-conviction relief for failure to state a *prima facie* case. *Tall v. State*, Op. No. 1739 (Alaska Court of Appeals, 5/11/01).

Post-conviction relief – advance warning of reasons for dismissal. When a judge decides to dismiss an application for post-conviction relief for the reasons previously advanced in the state's motion to dismiss, the applicant is not entitled to advance notice of the judge's intent to dismiss. (The court of appeals did not resolve the question whether advance notice is required when the judge dismisses for reasons of his or her own. The current rule does *not* require advance notice in this situation.) *Tall v. State*, Op. No. 1739 (Alaska Court of Appeals, 5/11/01).

Criminal Rule 45 – effect of defense request for continuance. When defense counsel moves for a continuance to accommodate his vacation schedule, Criminal Rule 45 does not necessarily begin running on the day defense counsel returns from vacation. In this case, defense counsel's request for a one-month continuance had the effect of tolling Rule 45 for two months, since the prosecutor and the trial judge were not available when defense counsel returned. *Wolfe v. State*, Op. No. 1740 (Alaska Court of Appeals, 5/11/01).

Disorderly conduct – sufficiency of the evidence. Where the evidence showed that the defendant, a school teacher, had grabbed a student by the arm and then had swung him around, pushed him up against a desk, and pinned him down on the desk, the evidence was sufficient to show that the defendant had committed disorderly conduct by "recklessly creat[ing] a hazardous condition for others by an act which has no legal justification or excuse." *Wolfe v. State*, Op. No. 1740 (Alaska Court of Appeals, 5/11/01).

Procedural default – off-record discussions. On appeal, parties will not be permitted to challenge rulings that they allow to be litigated off-record. Thus, in this case, the defendant was not entitled to challenge an evidentiary ruling on appeal where the bulk of the trial judge's explanation of

his ruling had occurred during an off-record, in-chambers conference and the defendant had not objected to conducting the conference off-record. *Heaps v. State*, Op. No. 1741 (Alaska Court of Appeals, 5/11/01).

Prior misconduct evidence – instructions on law applicable to prior conduct. When the state relies on evidence of a prior assault for the purpose of establishing the defendant's motive to commit the present assault, and the defendant asserts that the prior assault was committed in self-defense, the trial judge need not instruct the jury on the law of self-defense, since the question whether the defendant actually was guilty of assault in connection with the prior incident is irrelevant. It is enough to instruct the jury that the defendant is not on trial for the prior assault. (The court declined to resolve the question whether a self-defense instruction would have been warranted if the state had relied on the prior assault as evidence of the defendant's propensity to commit domestic assault.) *Heaps v. State*, Op. No. 1741 (Alaska Court of Appeals, 5/11/01).

Lesser included offenses – duty to instruct. The court of appeals criticized the view (adopted by courts in California and Illinois) that trial judges must instruct on any lesser included offenses that are supported by the evidence, regardless of whether either party requests the instruction. The court of appeals identified a number of disadvantages of this proposed rule and suggested that the proposed rule was inconsistent with Alaska Supreme Court precedent. *Heaps v. State*, Op. No. 1741 (Alaska Court of Appeals, 5/11/01).

Closing argument. A prosecutor did not exceed the bounds of proper closing argument by telling the jury that the defense strategy at trial had been to persuade jurors that the victim was "not worthy of the protection of the laws." The prosecutor told the jurors that "trashing the victim is a defense strategy, a tactic to make you not care about her, to make you think she does not deserve the protection of the laws like everyone else." The court of appeals concluded that the prosecutor's statements were a fair comment on the defense litigation strategy. *Heaps v. State*, Op. No. 1741 (Alaska Court of Appeals, 5/11/01).

Grand jury – evidence of value. A police officer's testimony before the grand jury that he estimated the value of the items stolen by the defendant at more than $25,000 was sufficient to support the defendant's indictment for first-degree theft. *Buckwalter v. State*, Op. No. 1742 (Alaska Court of Appeals, 5/11/01).

Procedural default – attack on indictment. A defendant who moves unsuccessfully to dismiss his indictment on the ground that the state failed to present exculpatory evidence to the grand jury, and who subsequently renews this claim on appeal, will not be permitted on appeal to rely on evidence different from the evidence that formed the basis for his argument in the trial court. *Buckwalter v. State*, Op. No. 1742 (Alaska Court of Appeals, 5/11/01).

Theft – aggregation of related thefts. The Alaska statute permitting aggregation of related thefts, AS 11.46.980©, requires the jury to decide in each case whether the thefts were part of a single course of conduct. (In this case, though, the state's failure to instruct the grand jury on this criterion for aggregation was harmless error.) Whether thefts qualify as part of a single course of conduct will depend in part on the degree of "calculation" by the defendant. *Buckwalter v. State*, Op. No. 1742 (Alaska Court of Appeals, 5/11/01).

Harmless error – jury instructions. Trial court's failure to instruct the jury that pawn shops, rather than owners of stolen property, were the "persons" referred to in the scheme-to-defraud instruction was, at worst, harmless error, since both the prosecutor and the defense lawyer had emphasized during closing argument that the pawn shops were the "persons" referred to in the instruction. *Buckwalter v. State*, Op. No. 1742 (Alaska Court of Appeals, 5/11/01).

Aggravating factors – factors that are elements of offense. Where the defendant was convicted of engaging in a scheme to defraud more than five people, the sentencing judge erred in assigning weight to the statutory aggravating factor in AS 12.55.155©(9) (the defendant knew his conduct involved more than one victim). If a factor in aggravation is a necessary element of the offense, the factor may not be used to aggravate the presumptive term. *Buckwalter v. State*, Op. No. 1742 (Alaska Court of Appeals, 5/11/01).

Felony driving while intoxicated – validity of predicate convictions. If, in a prosecution for felony driving while intoxicated, the defendant succeeds in persuading the court that his predicate convictions for driving while intoxicated were based on invalid guilty or no-contest pleas, and the court accordingly vacates the predicate convictions, the defendant still will be subject to prosecution for felony driving while intoxicated if the state re-prosecutes the predicate cases and obtains convictions. In other words, the fact that the predicate convictions are temporarily set aside after the filing of the charge of felony driving while intoxicated does not necessarily foreclose the eventual use of the convictions as predicate convictions for the charge of felony driving while intoxicated. *Tyler v. State*, Op. No. 1743 (Alaska Court of Appeals, 5/18/01).

Cooksey pleas – non-dispositive issues. The validity of the defendant's pleas of no contest in his prior drunk-driving cases was not a "dispositive" issue in his current prosecution for felony drunk-driving, and the defendant's *Cooksey* plea therefore was invalid. Even if the defendant succeeded in persuading the court of appeals to invalidate his no-contest pleas in the prior cases, the defendant still would be subject to re-prosecution in the prior cases, and so might eventually be subject again to prosecution on the charge of felony drunk-driving. (The court of appeals also expressed "serious doubts" about whether a defendant can enter a *Cooksey* plea over the prosecutor's objection.) *Tyler v. State*, Op. No. 1743 (Alaska Court of Appeals, 5/18/01).

Consent to search – apparent authority. The lessee of an apartment had apparent authority to consent to a search of the bedroom occupied by both her son and the defendant where: (1) she told police that she was in control of the entire apartment; (2) she told police that the defendant was not paying rent and that the defendant was staying there at her sufferance; (3) her son was 16 years old ("not an age where one would expect to find him living in a landlord-tenant relationship with his mother"); and (4) the defendant was sleeping on a mattress on the floor of the son's bedroom ("a circumstance that tended to corroborate [the mother's] assertion that [the defendant] was a guest who was staying there for free"). In concluding that the mother had apparent authority to consent to the search, the court of appeals also rejected the defendant's claim that the police should have questioned him and the son to "get their view of this matter" before conducting the search. *Fitts v. State*, Op. No. 1744 (Alaska Court of Appeals, 5/25/01).

Procedural default – inadequate briefing on appeal. A defendant who argued, unsuccessfully, that police were not justified in searching his bedroom failed adequately to brief the separate question whether the police were justified in opening a closed, albeit unlocked, saxophone case they found in the bedroom. The defendant's brief addressed only questions associated with the general validity of the search of the bedroom; it did not address the unique questions presented by the intrusion into the saxophone case. *Fitts v. State*, Op. No. 1744 (Alaska Court of Appeals, 5/25/01).

Cross-examination – good faith basis for questions. Information supposedly provided to defense counsel by the defendant, who did not intend to testify at trial, was not sufficient to give defense counsel a "good faith basis" for questioning the victim about whether the victim, a cab driver, had offered to purchase marijuana for the defendant. Accordingly, the trial judge did not err in precluding defense counsel from questioning the victim about this defense theory.

Fitts v. State, Op. No. 1744 (Alaska Court of Appeals, 5/25/01).

Robbery – "claim of right" defense. A defendant who threatens another person with a gun to obtain money from the other person is guilty of robbery, even if the other person swindled the money from the defendant. In other words, there is no "claim of right" defense to robbery. In this case, the court of appeals found that any impropriety in the prosecutor's closing argument was harmless, since the defendant's only defense – that the victim had swindled the money from him – was not a defense at all. *Fitts v. State*, Op. No. 1744 (Alaska Court of Appeals, 5/25/01).

Sexual abuse of a minor – "position of authority." The term "position of authority," as used in the statute defining third-degree sexual abuse of a minor, is broad enough to include a live-in boyfriend who exercises authority over the victim as a father figure and primary caretaker. *Wurthmann v. State*, Op. No. 1745 (Alaska Court of Appeals, 6/1/01).

Evidence – officer's accusatory statements during interview. The trial court did not abuse its discretion by admitting a tape of the defendant's pre-arrest interrogation without first redacting statements made by a police officer indicating that the officer believed the victim's allegations of sexual abuse. In reaching this conclusion, the court of appeals pointed out that the officer's "comments were so integral to the interview that their removal would have deprived the jury of the context for [the defendant's] statements." The court also pointed out, first, that the jury was itself in a position to evaluate the evidence that had formed the basis for the officer's accusatory statements and, second, that the officer had testified at trial that the statements were part of an interview strategy designed to encourage the defendant to admit his criminal conduct. *Wurthmann v. State*, Op. No. 1745 (Alaska Court of Appeals, 6/1/01).

Single-subject rule – 1997 Alaska Session Laws ch. 63. The bill that eventually was enacted as 1997 Alaska Session Laws ch. 63 did not violate Article I, Section 13 of the Alaska Constitution, which provides that "every bill shall be confined to one subject." This bill included revisions to the statutory definition of "incapacitated"; these revisions figured in the defendant's prosecution for sexual assault. The court of appeals said the various subjects addressed by the bill were adequately joined under the general rubric of crimes and crime victims. *Ragsdale v. State*, Op. No. 1746 (Alaska Court of Appeals 6/1/01).

Sexual assault – "incapacitated." The question whether a victim was "incapacitated" for purposes of a second-degree sexual assault prosecution is equivalent to the question whether the victim was temporarily incapable of understanding that she was engaged in sexual penetration with the defendant. Construed in this fashion, the term "incapacitated" is not unconstitutionally vague. *Ragsdale v. State*, Op. No. 1746 (Alaska Court of Appeals, 6/1/01).

Jury unanimity – second-degree sexual assault. Jurors considering a charge of second-degree sexual assault need not be unanimous about which statutory theory of the offense the state has proved. That is, jurors need not be unanimous about whether the defendant engaged in sexual penetration (1) with an incapacitated person or (2) with a person who was unaware that sexual penetration was occurring. *Ragsdale v. State*, Op. No. 1746 (Alaska Court of Appeals, 6/1/01).

Sexual assault – separate offenses. Two acts of vaginal penetration occurring moments apart, one with the defendant on top and one with the victim on top, constituted one course of conduct for purposes of the sexual assault statute. Therefore, jurors were not required to be unanimous about which of the two acts was the basis for their guilty verdict on the charge of sexual assault. *Ragsdale v. State*, Op. No. 1746 (Alaska Court of Appeals, 6/1/01).

Expert testimony – qualifications of expert. The trial court did not err in concluding that an alcohol-abuse counselor called by the defense was not qualified to testify as an expert on the subject of alcoholic blackout. Though the counselor had treated clients who had experienced alcoholic blackouts, he acknowledged that his prior knowledge of blackouts was limited; he said had spent an hour on the Internet searching for information about blackouts and also had found 15 journal articles that referred in some fashion to blackouts. The trial court also did not err in refusing to permit the counselor to act as a conduit for apprising the jury of textbook definitions of alcoholic blackout. *Ragsdale v. State*, Op. No. 1746 (Alaska Court of Appeals, 6/1/01).

Expert testimony – probative value of expert's testimony. Even if the alcohol-abuse counselor called by the defense was qualified to give expert testimony on "what a blackout is," the trial court did not abuse its discretion in excluding this testimony, since information about "what a blackout is" would not have been useful in the absence of additional information about, *e.g.*, diagnosing alcoholic blackout and differentiating blackout from other phenomena. The counselor's testimony on the very limited question of "what a blackout is" would only have led the jury into groundless speculation. *Ragsdale v. State*, Op. No. 1746 (Alaska Court of Appeals, 6/1/01).